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foot, 2 Hayw. 402; 1 Story on Cont. (5th ed.), § 519, and note 9. See, also, *Fulton v. Hood*, 34 Penn. St. 371.

The mayor and commonalty may avoid a deed by reason of a duress of the mayor: *Bayley v. Clare*, 2 Brownl. 276; 9 Vin. Abr. 320, *Duress*, B, pl. 27.

A servant cannot avoid a deed made by duress to his master, nor conversely :

Roll. Abr. 687; 2 Brownl. 276; Bac. Abr., *Duress*, B.

A bill of sale cannot be impeached by the seller's creditors, nor by an officer attaching in their behalf, on the ground of duress: *Lewis v. Bannister*, 16 Gray 500.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Illinois.

CHARLES P. STILLMAN v. FANNIE H. STILLMAN.

Where a wife is divorced *a vinculo*, and marries another man, who is able to afford her a reasonable support, suitable and corresponding with the position of the parties in society, she thereby elects to abandon her claim for future alimony on her first husband. The decree will not, however, be made retroactive, so as to cut off alimony that has previously accrued.

APPEAL from the Appellate Court, First District. The facts were as follows :

In July 1877, Fannie H. Stillman obtained a divorce from her husband, Charles P. Stillman, on bill filed in the Circuit Court of Cook county, where the parties resided. The decree rendered made it obligatory on defendant to pay complainant \$60 per month as alimony. That sum was regularly paid to complainant, up to the first day of February 1880.

On the 14th day of January 1880, complainant married Frank Eldredge, with whom she has ever since lived as his wife.

At the March Term 1880, of the Circuit Court in which the divorce proceedings were had, defendant appeared and entered a motion to amend the decree so as to exempt him from further payment of alimony, or to decrease the amount fixed by the decree. An affidavit of defendant set forth as the grounds of the motion, 1. A material decrease in the amount of his income since the rendering of the decree, and financial embarrassment occasioned by encumbrances upon his property, and 2. The subsequent marriage of complainant.

Complainant resisted the motion, and filed her own affidavit, in which she stated, 1. Facts tending to show the financial ability of defendant to continue to pay the alimony awarded her by the original decree, and 2. That the income of her present husband, after

discharging other obligations resting upon him, is insufficient to afford her an adequate support.

On the hearing of the motion, the court made an order modifying the original decree in such manner as to absolve defendant from further payment of the alimony ordered by the original decree, and in lieu thereof it was decreed defendant from that date should pay complainant one dollar annually, to be paid at the end of each year. A counsel fee was allowed complainant to resist the motion to reduce her alimony.

An appeal was taken by complainant from that decree to the Appellate Court of the First District. The errors assigned called in question the correctness of the judgment of the Circuit Court in amending the original decree in respect to the alimony allowed, and in reducing it to a nominal sum. Cross-errors were assigned, 1. As to the allowance of a solicitor's fee to the party resisting the motion, and 2. In not making such decree retroactive so as to suspend the payment of alimony after the first day of February 1880, on account of the previous marriage of complainant.

The Appellate Court reversed so much of the order of the Circuit Court as absolved defendant thereafter from paying alimony as required by the original decree, and giving complainant in lieu thereof one dollar a year, but in other respects affirmed the order or decree of the Circuit Court.

An appeal was granted to defendant on a single question, viz. : Whether the subsequent marriage of complainant *ipso facto* entitled defendant to have the alimony provided in the original decree reduced to a nominal sum, complainant's husband being unable to provide her with a suitable support, and defendant being able to pay the amount fixed in the original decree, the court being of opinion such question is involved in this case, and is of such importance on account of principle and collateral interest that it should be passed upon by the Supreme Court.

A. T. Galt, for appellant.

Joseph Wright, for appellee.

The opinion of the court was delivered by

SCOTT, J.—The Appellate Court,* by its judgment, assumed to find certain facts: 1. That defendant is the owner of a large estate

* The decision of the Appellate Court is reported in 7 Bradwell 524.

derived from his father, who is deceased, and has means out of which he might comply with the original decree as to alimony; and 2. That since the rendering of the original decree, complainant, on January 14th 1880, married a man by the name of Eldredge, who works upon a salary of seventy-five dollars per month, out of which he has to support an aged mother, and that he is unable to support complainant.

It will be observed, this is not a case where the findings of facts by the Appellate Court, although embodied in and made a part of its judgment, is conclusive on the Supreme Court. The Practice Act has not so provided. In all chancery cases, this court may look into the record and ascertain what facts are established by the evidence. The rule as to the practice in such cases has been settled by repeated decisions of this court. On looking into the record it is seen the testimony concerning disputed facts is contained in *ex parte* affidavits—a most unsatisfactory mode of eliciting the truth as to any question of fact. It is shown defendant's income is now much less than when the alimony was fixed by the original decree, and that his property is so heavily encumbered as to cause great financial embarrassment.

It is admitted the income of complainant's husband is seventy-five dollars per month, but it is not proved that sum is not sufficient to enable him to afford her a suitable support, considering the social position she occupies. It certainly cannot be declared as a fact generally known that it is not. It may therefore be assumed for the purposes of the decision of the question involved, as the same is certified to this court, that defendant is able to pay the alimony provided in the original decree, and that complainant's husband is able to afford her a reasonable support every way suitable and corresponding with the position the parties occupy in social life.

The question presented has not before arisen in this state, and the court is left free to determine it as one of first impression, by the aid of such decision as may have been given to it by other courts whose judgments are entitled to respect. The jurisdiction of the court to grant the relief sought, is expressly conferred by statute, which provides the court in which any divorce is decreed may make such order touching alimony and maintenance of the wife, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, and may on application

from time to time make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper.

Although our statute vests courts granting divorces with large discretion in respect to the allowance of alimony, and in the making of such alterations concerning the same as shall appear to be reasonable and proper, it is understood to be a judicial discretion, subject to review in an appellate court, so that there may be no abuse of that discretion with which courts are clothed in such matters, and to the end that justice may be done.

The Circuit Court was of opinion the subsequent marriage of complainant so changed the relations of the parties as to make it reasonable and proper to reduce the alimony granted by the original decree to a nominal sum, and so decreed. That decision finds sanction in considerations that affect vitally the best interests of society and conserve a sound public policy.

Alimony is that allowance which is made to a woman on a decree of divorce, for her support, out of the estate of her husband. At common law it was usually settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.

The practice in our courts follows closely the practice in the English courts in that respect. Underlying all rules of practice to which long usage has given the consistence of law, may be found some reason that satisfies the common judgment of their justness.

Accordingly, it is found the principle on which alimony is given to the divorced wife is, it is the equivalent of that obligation implied in every marriage contract, the husband shall furnish his wife what shall be deemed a suitable support, corresponding in degree with his pecuniary ability and social standing, and from any further performance of his marital obligation in that regard, he is absolved by the decree of divorce. Our statute is silent as to when and for what cause the husband may be relieved from further payment of alimony imposed by the decree. In the absence of legislation, the question remains for the decision of the courts. Of course, the decease of the beneficiary operates to suspend all further payment of alimony.

It is for the obvious reason it is no longer necessary for her support, the personal representatives were never permitted to recover any portion of the sum decreed, except such sum or instalment thereof as had become payable in her lifetime, and which

remained unpaid at her death. Reasoning from analogy, it would seem that when, for any cause, the alimony decreed becomes unnecessary for the support of the wife, or when circumstances transpire that make it inequitable she should have further allowance, it would be reasonable and proper for the court to absolve the husband from the burdens imposed by the decree. This the court has ample power to do under our statute.

It would be difficult to suggest or conceive any cause that would present grounds more "reasonable and proper" for suspending further payment of alimony than the subsequent marriage of the divorced wife.

The impression made by the doctrine of the common law that by marriage husband and wife are one person in law, has not been entirely removed from the mind by modern legislation. The obligation, implied in the marital relation, resting on the husband to support his wife, remains, having all the binding efficacy it had at common law.

Courts of equity will be slow to change that obligation in any case from the husband to another man, although he may once have been the husband of the wife. Aside from its positive unseemliness, such a policy finds no support in any equitable consideration.

Treating alimony, as may be done, as the equivalent of that obligation for support which arises in favor of the wife out of the marriage contract, and which is lost when that contract is annulled by the decree, she obtains the same obligation for support by a second marriage. It is unreasonable that she should have the equivalent of an obligation for support, by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time.

It is illogical as well as unreasonable. It is her privilege to abandon the provision the decree of the court made for her support, under the sanctions of the law, for another provision of maintenance which she would obtain by a second marriage; and when she has done so, the law will require her to abide by her election. There is no reason why she should not do so.

Conforming closely with this view of the law, are the following cases, in which questions analogous with the one involved were considered: *Albee v. Wyman*, 10 Gray 222; *Bowman v. Worthington*, 24 Ark. 522.

All the cases referred to as holding doctrines contrary to the

views here expressed, have been carefully examined. It is not perceived that any of them are directly in point, unless it is *Shepard v. Shepard*, 1 Hun (N. Y.) 241. The reasoning of the court in that case on the question involved in this decision, is neither conclusive nor satisfactory.

Forrest v. Forrest, 3 Bosw. 661, is upon a question that does not come within range of this decision. Nor was the effect of a subsequent marriage of the wife upon her alimony discussed, when the *Forrest* case was before the Court of Appeals (25 N. Y. 501.)

Miller v. Clark, 23 Ind. 370, holds, that arrears of alimony decreed by a court in favor of a divorced wife, under the statutes of that state, may be collected after her death by her administrator. Exactly the same question was considered by this court in *Dinet v. Eigermann*, 80 Ill. 274, and the same conclusion reached.

Perkins v. Perkins, 12 Mich. 456, holds, that the section of the statute of that state which provides that after decree for alimony, the court may, from time to time, on the petition of either party, revise and alter such decree, must be construed as only authorizing the change on new facts thereafter transpiring, which are of such a character as to make the change necessary to suit such new state of facts; and in so far as that case can have any possible application to the case in hand, it is fully indorsed.

It is said, the policy of the law favors rather than restrains marriage; and the suggestion of counsel is, if the subsequent marriage of the wife shall be held to suspend the further payment of alimony by the former husband, it is in restraint of marriage, which is forbidden. It is not perceived there is any force in the argument on this branch of the case.

Pension laws, suspending further payments to widows, on account of subsequent marriage, have existed many years, and no suggestion was ever made that they operated in restraint of marriage.

Nor is it understood how such laws could have any such effect. Pensions are no doubt granted under the belief they furnish in some degree at least, that support which it is supposed the husband would have rendered to the wife if living, and which is lost to her by his death.

On her subsequent marriage, she simply abandons the provision which the law humanely made for her for a support, which she has a right to expect she will receive from her second husband. That is precisely the case as to alimony. The divorced wife abandons

the provision made for her support out of the estate of her former husband, by the decree of the court, for that adequate support which she contracts for by the subsequent marriage. It is a matter that affects her own happiness, and about which she is perfectly free and competent to make a choice. Whether she acts wisely in her election, or whether in every instance she obtains as good or as adequate support by her marriage, as that which she abandoned, are questions about which courts can have no concern. It is a matter of her own voluntary election.

There was no error in the Circuit Court in refusing to make its decree retroactive, so as to cut off alimony that had previously accrued. As respects the allowance of counsel fees to complainant, in resisting the motion for the reduction of her alimony, the court acted within powers conferred by the statute, and the fees allowed are not unreasonably high.

The judgment of the Appellate Court will be reversed, and the cause remanded with directions to that court to affirm the decree of the Circuit Court in all things.

The question discussed in the principal case is, as stated by the court, a new one in the state of Illinois, and has, notwithstanding its practical importance, received very little discussion by the courts of other states.

The original English divorce act (20 & 21 Vict. c. 85, § 32) provides that "the court may, if it shall think fit, on any such decree [of divorce *a vinculo*], order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable," &c. This provision may, in the discretion of the court, be given in the form of alimony, and in the decree allowing it, there appears always to be inserted a provision that it shall continue only *dum sola et casta vixerit*. See 2 Bish. Mar. & Div. § 477 b; *Fisher v. Fisher*, 2 Swab. & Tr. 410, 414; *Gladstone v. Gladstone*, 1 P. & D. 442, 446; *Chetwynd v. Chet-*

wynd, L. R., 1 P. & D. 39; *Sidney v. Sidney*, 4 Swab. & Tr. 178. In *Fisher v. Fisher*, *supra.*, Sir C. CRESSWELL, Judge Ordinary, with reference to this subject said: "Again, if she avails herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to maintain her." Again, with reference to this subject, HANNEN, President, in *Gladstone v. Gladstone*, *supra.*, said: "I think it perfectly reasonable in these cases where the husband is called upon to sacrifice a portion of his own means that the conditions *dum sola et casta vixerit* should be imposed, but I am of opinion that when the effect of the order is only to deprive the husband of his interest in the wife's fortune, and to put the innocent wife into immediate possession of her own income, no such condition ought to be imposed."

In the United States a diversity of opinion prevails upon the subject. In *Shepherd v. Shepherd*, 1 Hun 240; s. c. 3 Thomp. & C. 715, where the alimony allowed the wife was \$3000 per year,

and her second husband had an income of \$2500 a year, and where the wife derived an income of \$672.50, by reason of a marriage prior to that with the defendant, it was directly held that her alimony was not affected by the last marriage, and should not be reduced on that account. The proofs in this case, says the court, showed that the wife was dependent upon the provision made for her support by the decree, and that it was not claimed that any change had occurred in the circumstances of the husband rendering him unable to supply it.

In rendering the opinion of the court, DANIELS, J., said: "The statute empowers the court, upon making a decree in favor of the wife, dissolving the marriage for the misconduct of the husband, to require him to provide such suitable allowance for her support as it shall deem just, having regard to the circumstances of the respective parties. And the continuance of that allowance is in no way rendered dependent on the fact that she shall not afterwards marry again. It is liable to no such contingency [3 R. S., 5th ed., 236, § 58.] Beyond that the statute expressly secures to the wife the right to marry again when she is the innocent party to the decree, and it neither expressly, nor by any reasonable implication, deprives her of her allowance by way of alimony for so doing [Id. 237, § 62.] Complete control is given the court over the subject of the amount, but that is in no sense rendered dependent upon the circumstances of her subsequent marriage, and as long as that is the nature of the provision made upon this subject, the court is not authorized to add a further qualification, for which no warrant has been supplied by law. The remedy is entirely statutory in its nature, and must be governed by the import and spirit of the legislation upon the subject, and, as it has not been provided that the wife shall forfeit her alimony by afterwards remarrying, the court has no right to attach that as a penalty to the

act." *Forrest v. Forrest*, 25 N. Y. 501, 514-16, affirming s. c. 3 Bosw. 661, is cited by the court in the opinion above quoted from. In New York, however, under the statute the adjustment of alimony is regarded as final, so that the decree cannot be changed in this respect after the court finally adjourns for the term. See *Kamp v. Kamp*, 59 N. Y. 212; *Kerr v. Kerr*, 59 How. Pr. 255; *Park v. Park*, 18 Hun 466; 2 Bish. Mar. & Div. §§ 433 a, 478. The case of *Shepherd v. Shepherd*, may, therefore, properly be considered as not of controlling authority upon the question under consideration in the principal case.

In *Albee v. Wyman*, 10 Gray 222, referred to by the court in the principal case, by articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for a divorce, to pay her a certain sum annually during her life. The wife afterwards, by another similar libel, obtained a decree for a divorce *a vinculo*, and for alimony, which by agreement was fixed at the sum payable under the articles. The wife, after receiving two instalments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum; and it was held that the covenant, if ever valid, was discharged by the decree for alimony, it having been accepted in lieu of such covenant, and that, upon the subsequent reduction of the alimony by the court, the covenant could not be made the basis of a recovery. The question involved in the principal case does not seem to have been litigated in this case, but the propriety of the order reducing the alimony seems to have been assumed, and its discussion to have been incidental only and not necessary to the decision of the cause.

In *Bowman v. Worthington*, 24 Ark. 522, the wife, after the divorce, remarried, and was left a widow by the death of her second husband, and the court, on the authority of *Albee v. Wyman*,

supra, were of opinion that she had no right to alimony or support from the first husband, either during the life of the second husband or after his death. The application for alimony was made in this case by a bill filed solely for that purpose after the death of the second husband.

Where the statute does not allow any change of the decree after the court finally adjourns for the term, the remarriage of the wife can of course have no effect upon her right to alimony under the decree. If, however, we accept the definition of alimony given by the court in the principal case as being "that allowance which is made to a woman on a decree of divorce for her support out of the estate of her husband," which appears to be correct (see 2 Bish. Mar. and Div., sect. 351); and if, as it is said, it is measured by the wants of the person entitled to it, and the circumstances or ability of him who is bound to furnish it (see *Wheeler v. Wheeler*, 18 Ill. 39; *Foote v. Foote*, 22 Ill. 425), then, where, as in Illinois, the court may, after the rendition of the decree, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper, the decision of the court in the principal case would seem to be in accordance with the weight of authority and not unreasonable in itself. It is to be observed, however, that the case in the Supreme Court was decided upon a different state of facts from that assumed as the basis of decision by the Appellate Court of the First District, and the rule of decision laid down by the learned judge who delivered the opinion reported in 7 Bradwell 524, may still be regarded as having great weight should the question there decided again arise. The question to be decided was thus stated by McALISTER, P. J., in the Appellate Court: "Is the mere fact that plaintiff, two years and a half after the decree of divorce, married again, but

to a man unable to support her, sufficient to justify a court of equity, acting upon the principles of natural justice, to thus interfere in favor of a party so culpable, and against one otherwise so entirely blameless?" In solving this question, the learned judge observed that "as a consequence of such wrong on his [the husband's] part, an obligation arose which has its foundation in natural equity, is recognised by positive law, and bound him to furnish maintenance for her, to be measured by her wants and his circumstances and ability, and to continue during their joint lives, unless she acquired other means of support;" and then stated what he regarded as the true rule, viz.: "That while the remarriage of the wife might be *prima facie* or presumptive evidence that she had acquired other means of support, yet it is not conclusive; and when it is made to appear that actually she had not, then such marriage affords no ground for relieving the former delinquent husband from the alimony provided in the decree, or for reducing it to a mere nominal sum." It will be seen that the rule of decision of the principal case adopted by the Appellate Court is not inconsistent with that adopted by the Supreme Court, where the complainant's husband was regarded as able to afford her a reasonable support; neither is it as it seems, inconsistent in this respect with *Shepherd v. Shepherd*, *supra*; for in that case also the court says that the wife was dependent upon the provision made for her support by the decree. Although in a case like the principal case, the guilty husband is entitled to no sympathy and the innocent wife to the entire sympathy of the court, still upon the facts as found by the court, the decision seems correct, and supplemented by the decision of the Appellate Court, forms a valuable contribution to the law upon an important and interesting subject.

MARSHALL D. EWELL.

Chicago.